

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 FEREYDUN TABAIAN and AHMAD )  
4 ASHRAFZADEH, )  
5 )  
6 Plaintiffs, ) No. 3:18-cv-00326-HZ  
7 )  
8 vs. ) June 27, 2018  
9 )  
10 INTEL CORPORATION, ) Portland, Oregon  
11 )  
12 Defendant. )  
13 -----  
14

15 **TELEPHONIC HEARING**

16 TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE MARCO A. HERNANDEZ

18 UNITED STATES DISTRICT COURT JUDGE

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## 1 P R O C E E D I N G S

2 THE CLERK: Good morning. This is the matter of  
3 Tabaian, et al. versus Intel Corporation, Case No. 18-cv-326,  
4 Judge Hernandez presiding.

5 This is the time set for a Rule 16 conference.  
6 Please note we have a court reporter present, so please  
7 identify yourself each time you speak.

8 Counsel, please tell me who all is on the record,  
9 starting with the plaintiff.

10 MR. CLOSE: Good morning, Your Honor. This is Howard  
11 Close with Wright Close & Barger in Houston, Texas.

12 MR. MOTLEY: This is Luke Motley with Luke Motley, IV  
13 PC.

14 MR. LOVE: Jeff Love with Klarquist Sparkman, and  
15 also Mark Wilson with Klarquist Sparkman.

16 MR. McANDREW: And additionally, Your Honor, Patrick  
17 McAndrew and Kathleen Rose with Wright Close & Barger in  
18 Houston.

19 THE CLERK: And for defendant?

20 MS. ROTHauge: Good morning. For Intel, I am Renee  
21 Rothauge of Markowitz Herbold. I'm joined by Michael  
22 Summersgill of Wilmer Hale, lead trial counsel; Jordan Hirsch  
23 of Wilmer Hale; and Mashhood Rassam, Intel.

24 THE COURT: Good morning.

25 MR. SUMMERSGILL: Good morning, Your Honor.

1 THE COURT: Good morning. This is Judge Hernandez.  
2 We're here to try to put together a schedule for yo  
3 leading up to a *Markman* hearing. I know that you are asking  
4 that -- I think -- that we use Western Washington's local  
5 rules regarding patent.

6                   Are both sides asking that I do that, turning first  
7 to the plaintiff?

8 MR. CLOSE: Yes, Your Honor. We are.

13 Yes, we are, Your Honor.

14 THE COURT: Thank you.

15 And is the defense in agreement with that?

16 MR. SUMMERSGILL: Your Honor, this is Michael  
17 Summersgill.

18                   And, no, we are not in agreement on that. Our  
19 understanding, based on having been in this jurisdiction  
20 before and speaking with Ms. Rothauge, is that typically the  
21 Courts apply, you know, a particular course that's appropriate  
22 for a given case, and that's one of the reasons why patent  
23 local rules have not been adopted. And we think that's  
24 particularly appropriate for this case, and that's why we  
25 disagree with that.

1                   And I can get into that whenever it's appropriate,  
2 Your Honor.

3                   THE COURT: No. That's okay. I like to do whatever  
4 I want to do anyway, so don't worry about it.

5                   (Laughter.)

6                   THE COURT: All right. So then let's talk about what  
7 we need to accomplish together between now and your *Markman*  
8 hearing.

9                   And I want to first turn to the plaintiff. And on my  
10 list of things to do are figuring out the infringement and  
11 invalidity contentions, disclosing -- disclosure of claims to  
12 construe and the terms to construe. My job will be to limit  
13 the number of those claims and terms to construe so that you  
14 don't drive me crazy by giving me too many.

15                   As I understand it, there's only one patent in issue  
16 and one claim in issue. So let's confirm that.

17                   MR. CLOSE: There's one independent claim, Your  
18 Honor, and I think there's 18 dependent claims, but there's  
19 only one independent claim at issue.

20                   THE COURT: Oh, okay. All right.

21                   And then we need to kind of take into  
22 consideration -- I'm not familiar with the technology. It's  
23 described to me in a way that makes it so that I generally  
24 understand what it does, but I'm sure that at some point it  
25 may become more technical than I'm familiar with. And so one

1 of the things to keep in the back of your minds is if this  
2 technology is that, how you're going to educate me in a way  
3 that is understandable.

4 So let's start at the beginning, and I'm turning to  
5 the plaintiffs and your list of things that need to be  
6 accomplished and the schedule that you think you will need in  
7 order to get those things accomplished.

8 MR. CLOSE: Certainly, Your Honor. This is Howard  
9 Close for the plaintiffs.

10 We've worked with the other side on the various  
11 issues in the Rule 26 order. And basically there's a couple  
12 of things that we have disagreement on, and those are the  
13 things I think we need to get accomplished with the Court  
14 today.

15 One of them is we would like to get discovery so that  
16 we could be able to -- so that the Court would know, when it's  
17 evaluating the claim terms, basically how this all fits  
18 together, whether what we're saying our patent does matches  
19 what they say their product does.

20 We've proposed some discovery. We have a  
21 disagreement on the timing of that discovery, but we think we  
22 need to get that done.

23 We have a disagreement on deposition limitations.  
24 We had talked about an hour limit. The other side had talked  
25 about a specific number of depositions and specifically

1 limiting us to a specific number of depositions for Intel. We  
2 just weren't able to agree on that point.

3 And then the third thing is a protective order.  
4 We're working on a protective order. We had a conference call  
5 with defendants today on a proposed way to try to work out a  
6 protective order. So we need to work out those issues so that  
7 we can get this thing moving forward.

8 THE COURT: On the discovery part of it, do you have  
9 agreement as to the scope of discovery and what it will -- you  
10 know, what it's going to include and what it's not going to  
11 include?

12 MR. CLOSE: I don't -- I don't know if we have --

13 UNIDENTIFIED SPEAKER: We haven't discussed it.

14 MR. CLOSE: We haven't really discussed scope so  
15 much. It's more of the timing, Your Honor, that we've been  
16 having a hard time agreeing on. We'd like to have discovery  
17 of -- some basic core discovery about the product at issue so  
18 that we can make sure, when we're trying to talk to you about  
19 what claim terms we need to construe and things like that, we  
20 know whether that's important or not, based on the product at  
21 issue.

22 We're not trying to discover all types of outside  
23 things. In fact, we're fine with pushing off, you know,  
24 discovery on damages and things like that, since we're not  
25 worried about those, as opposed to focusing in on whether or

1 not the product that Intel makes infringes on our patent.

2 And so that's, I think, the only scope issues that  
3 we've really talked about.

4 THE COURT: And have you figured out -- and maybe you  
5 believe that your claim does it sufficiently, but what the  
6 specific infringement contentions are?

7 MR. CLOSE: We're --

8 UNIDENTIFIED SPEAKER: We're working on that.

9 MR. CLOSE: We're working on that. But we think that  
10 we need -- there are certain -- you know, all we have are what  
11 we know about our patent and what we know about the Intel  
12 product from publicly available data. But we don't have the  
13 specific data that's necessary to make sure that we're  
14 accurately describing how the Intel product infringes on our  
15 particular patent.

16 THE COURT: So what you're saying is you need  
17 discovery in order to define for the defendant what the  
18 specific infringement contentions are.

19 MR. McANDREW: Yes, Your Honor. This is Patrick  
20 McAndrew, also for the plaintiffs.

21 And what we really would like to do is to be able to  
22 have some discovery take place prior to the claim construction  
23 that occurs. And this kind of requires us to do some  
24 discovery on the accused device so we know what claim terms  
25 need resolution and what issues really are valid, mainly so we

1 don't ask you to construe a term without guidance and, you  
2 know, essentially have the Court improperly issue some sort of  
3 advisory opinion.

4 We would like to have the discovery take place early  
5 on. And if we can do that, I think, you know, we can move  
6 towards a greater understanding by both sides of what issues  
7 are valid and whether or not, you know, as the defendants  
8 contend, the case can be disposed of on summary judgment.  
9 We'd like to know that very quickly.

10 THE COURT: What kinds of things are you going to be  
11 asking for?

12 MR. McANDREW: Sure. You know, Your Honor, we  
13 exchanged, both sides -- I'm sorry. Again, this is Patrick  
14 McAndrew.

15 We exchanged initial discovery and we sent the  
16 plaintiffs one -- the defendant one interrogatory that  
17 requests them to identify schematics and other design  
18 documents that they contend support their non-infringement  
19 allegations that are listed in its Answer and Counterclaim and  
20 describe how those support the allegations.

21 We additionally sent a number of requests for  
22 production that cover a lot of those issues as well, and Intel  
23 has propounded discovery on us as well. Those responses are  
24 due on Monday.

25 And, as Mr. Close said, we had an initial

1 conversation today with counsel for Intel regarding the  
2 protective order and trying to get closer to where we are,  
3 where the parties currently are. And we proposed to go back  
4 and speak again early next week.

5 You know, one possibility, Your Honor, could be that  
6 we allow the parties to try to work out the protective order  
7 and do some discovery and schedule another Rule 16 conference  
8 a little bit down the road, that then once we have a better  
9 understanding of where we are, we can really lay out the road  
10 map to get to the *Markman* hearing.

11 THE COURT: Okay. Thank you.

12 Let me hear from the defendants.

13 MR. SUMMERSGILL: Thank you, Your Honor. This is  
14 Michael Summersgill.

15 A couple of things. Let me start with the last point  
16 Your Honor made about at some point giving you a helpful  
17 understanding of the technology. I'm sure the parties can  
18 work together, as we've done in other cases, to put together a  
19 tutorial where we can walk through the technology.

20 As far as these cases go, the technology in this case  
21 is relatively straightforward. It's about a particular type  
22 of voltage regulator which, as its name suggests, it's  
23 something that regulates voltage and does it in a particular  
24 way. But I think we can work with the other side maybe to  
25 make proposals on a tutorial ahead of the claim construction.

1                   There is no dispute that we'll be producing  
2 discovery, and we're working on that right now. We're working  
3 on getting our -- collecting our documents and getting them  
4 ready for production. But the suggestion that the plaintiffs  
5 need to delay the claim construction process until after they  
6 have our documents is just inconsistent with Federal Circuit  
7 law.

8                   As Your Honor is aware, the *Phillips* case, the  
9 Federal Circuit *Phillips* case, dictates or provides rules for  
10 claim construction. And claims are supposed to be construed  
11 based on the plain language of the claims, the patent  
12 specification, and the file history. The operation of our  
13 products is completely irrelevant to the -- to the proper  
14 construction of the claims.

15                  Now, Your Honor, the two primary disputes, from our  
16 perspective, on the scheduling issues relate to the timing of  
17 claim construction and then the timing of the infringement and  
18 invalidity contentions. And what we've proposed is -- is a  
19 schedule that brings the claim construction process a little  
20 bit earlier in the schedule, and it's a schedule that  
21 proposes infringement and invalidity contentions that actually  
22 have some teeth, that mean something. And we have proposed  
23 that because we think this is a case that is susceptible to  
24 early resolution. And let me explain why we -- why we think  
25 that.

1                   The patent is directed, as I said, to a particular  
2 type of voltage regulator. It's a voltage regulator that uses  
3 temperature data to make certain adjustments, without getting  
4 into the details, but it's using temperature data to adjust  
5 what are called feedback loops, both a circuit feedback loop  
6 and a voltage droop feedback loop.

7                   Intel simply does not do that. We've spoken to the  
8 Intel engineers. Intel doesn't do that. And so we think that  
9 once the claims are construed, plaintiffs will not have a  
10 basis for asserting infringement. We don't think there is an  
11 infringement argument under any plausible construction of the  
12 claims.

13                   And so our proposals are designed to get the claims  
14 construed as early as possible and to get the parties'  
15 positions out in front as early as possible so that we can see  
16 what the real disputes are and we can set the case up for  
17 possible early resolution.

18                   Now, so our -- on the claim construction issue, we're  
19 proposing that the parties propose terms for construction on  
20 July 13, propose construction by August 10, and then the  
21 completion of claim construction briefing by November 21st.

22                   And we'd submit, Your Honor, that this proposal is  
23 more efficient than the plaintiffs' proposed for three  
24 reasons. One, it's going to make discovery more efficient.  
25 Of course, the issues of infringement and invalidity often

1 depend in part on claim construction, on the scope of the  
2 claims. And if we know what the parties' positions are on  
3 claim construction and then have the Court's ruling on claim  
4 construction sooner rather than later, we can focus the  
5 discovery on the issues that are relevant under that  
6 construction.

7 Second, as I said, we think this case is susceptible  
8 to early resolution. And resolving the claim construction  
9 early will clarify the scope of the claims and we believe show  
10 that they can't make out a case of infringement, so it will  
11 set the case up for early summary judgment.

12 And there's a host of cases out there, some of which  
13 we cited in our section of the 26(f) report, which talk about  
14 the -- the benefit of doing an earlier claim construction in  
15 cases such as this, the *Lexos Media IP* case that we cited, the  
16 *MyMedical Records* case that we cited.

17 And there's an additional case. It's a District of  
18 Delaware case from 2016, the *MorphoSys AG v. Janssen Biotech*  
19 case. And I think it provides a nice sort of explanation of  
20 why this is important. The Court there granted early claim  
21 construction where the claim terms at issue were relevant to  
22 every claim; and that's, of course, true here because there's  
23 only one independent claim. It appeared possible that if the  
24 defendant's proposed constructions are adopted, those  
25 constructions will ultimately be case dispositive. We believe

1 that to be true here. And there's not much discovery required  
2 for the claim construction process. And, again, we believe  
3 that's true here because their claims, under *Phillips*, are  
4 supposed to be construed based on the intrinsic evidence, the  
5 patent and the file history.

6 And the third piece I'd say about doing claim  
7 construction according to our schedule is that there's no  
8 reason that we can't do it. You know, the plaintiff certainly  
9 had to have a basis before they filed this case, both an  
10 understanding of their own patent and a basic if not more  
11 developed understanding of what we do and why they believe we  
12 infringe. And they have all of the information they need now  
13 to construe the claims of their own patent. As I said, what  
14 our products do is irrelevant to the construction of the  
15 claims.

16 So for all of those reasons, we think it makes more  
17 sense and would be much more efficient to adopt our claim  
18 construction proposal.

19 THE COURT: Do you anticipate having any experts  
20 testifying regarding claim construction, you know, telling me  
21 that a person of ordinary skill in the art is going to look at  
22 this particular term in a particular way?

23 MR. SUMMERSGILL: Your Honor, this is Michael  
24 Summersgill again.

25 You know, not necessarily. It's not always the case.

1 And, as I said, it's the intrinsic evidence that is relevant.

2 Now, if the plaintiffs were to submit a declaration  
3 from an expert taking positions that we think are contrary to  
4 what one of ordinary skill in the art would say, in that  
5 situation we would certainly want to submit a responsive  
6 declaration. But, you know, typically we try to avoid expert  
7 declarations for claim construction because, again, it's the  
8 intrinsic evidence that's supposed to be relevant.

9 MR. LOVE: Your Honor, this is Jeff Love.

10 May I just respond to the issue about the need for  
11 discovery before the claim construction process?

12 THE COURT: Sure.

13 MR. LOVE: Yes. This is Jeff Love for the  
14 plaintiffs.

15 I'd refer the Court to the lead case on the  
16 helpfulness of discovery and evidence about the accused  
17 product to the claim construction process, which is *Wilson*  
18 *Sporting Goods v. Hillerich & Bradsby*, 442 F.3d 1322, 1326 and  
19 1327. It's a 2006 Federal Circuit case.

20 And just what that case states is that knowledge of  
21 the "product or process provides meaningful context for the  
22 first step of the infringement analysis," which is claim  
23 construction. And it's "convenient for the court to  
24 concentrate on those aspects of the claim whose relation to  
25 the accused device is in dispute."

1                   And I have before me several other cases that have  
2 followed that, and we cited that as well, bench Circuit cases.

3                   And, you know, the point is that what the defendants  
4 have proposed is going into claim construction blind, without  
5 the -- without the Court having the benefit or the plaintiffs  
6 having the benefit of knowing what's really in factual  
7 dispute. Because the point of claim construction is not an  
8 abstract exercise of just looking at the patent and the file  
9 history and the intrinsic evidence as what's said. The point  
10 is to do that in order to facilitate resolution of disputes  
11 relevant to infringement and invalidity.

12                  And that's why to just be forced to choose, for  
13 example, claim terms to construe, when the plaintiffs have had  
14 not the benefit of looking at the documents that the  
15 defendants have in hand -- they just told you they talked to  
16 their experts at Intel, or engineers, and their Intel  
17 engineers tell them that "We don't infringe for several  
18 reasons." And Monday is their deadline for where they should  
19 be producing the pertinent information.

20                  You know, and so what we ought to do is make sure  
21 that we get that information so that the plaintiffs can  
22 understand what's in dispute factually. And then we can  
23 tailor the selection of claim terms accordingly so that when  
24 the Court goes through the exercise to construe them, it will  
25 have a much, much better chance of actually resolving the

1 disputes.

2                   And with respect to the documents that we need, my  
3 understanding is that the defendants are prepared to produce  
4 RTL-level source code and then also schematics that will  
5 include, you know, a full description of what's at issue in  
6 the case, which is this voltage regulator.

7                   We have asked for them, in our interrogatories, to  
8 identify the particular pages, essentially, of those two types  
9 of documents -- the source code and the schematics -- that are  
10 actually pertinent to the non-infringement defenses that they  
11 rely on. Until they give us an interrogatory response that  
12 does that -- I think we're talking about, you know, a  
13 relatively few pages that are going to be answering that  
14 question. And, again, they asked for an extension to Monday,  
15 but not beyond that. We understand that they should be  
16 prepared to produce those on Monday.

17                   We've got to work out the protective order issue.  
18 We're agreeable to the Court's standard two-tier protective  
19 order, but they want some heightened protection. If they  
20 could just produce those documents now, subject to the Court's  
21 two-tier protective order, while we're working out other  
22 issues, that's the best way to get ready for an early claim  
23 construction.

24                   But to set a schedule before we've got the documents  
25 or know how long it's going to take us to get those documents

1 that Intel has in hand and they're already saying, you know,  
2 that their engineers have identified what's really at issue,  
3 that makes no sense.

4 MR. SUMMERSGILL: Your Honor, this is Michael  
5 Summersgill. May I respond to a couple of those points?

6 THE COURT: Sure.

7 MR. SUMMERSGILL: The first thing is we actually  
8 aren't the ones that asked for the extension. Plaintiffs  
9 asked for a two-week extension, and we agreed with it. So we  
10 didn't ask for the extension.

11 Second, we're familiar with the *Wilson Sporting Goods*  
12 case. And I think it's important to note that *Wilson* doesn't  
13 say that you look to the defendant's products to determine the  
14 proper construction of the claims. It doesn't say that at  
15 all. *Phillips* and all of the claim construction cases  
16 are -- are construed based on the claims, the specification,  
17 and the file history. And, in fact, the *Wilson* case itself  
18 says, "This court, of course, repeats its rule that 'claims  
19 may not be construed with reference to the accused device.'"

20 So that's -- so the *Wilson* case doesn't say that  
21 discovery regarding a defendant's products are necessary. It  
22 says claims are not to be construed with respect to the  
23 accused device.

24 Sometimes understanding what is at dispute can help  
25 focus the claim construction dispute and what terms to choose.

1       But, you know, we've done a little bit of that already with  
2       them, both in meet and confers and on this conference. We've  
3       said, among other things, we don't use temperature data in the  
4       particular way that's required by these claims.

5           And, you know, so -- and typically plaintiffs don't  
6       often propose many terms for construction. So I think this is  
7       a little bit of a red herring. We would propose somewhere  
8       between five and seven terms for construction. We're prepared  
9       to do that immediately. We're prepared to exchange proposed  
10       claim constructions according to the schedule and proceed with  
11       the claim construction process. And that will, I think, very  
12       clearly focus and narrow the issues.

13           And, you know, if the plaintiffs can now tell you  
14       and tell us how they believe we use temperature data as  
15       required by the claims, then -- you know, then maybe we don't  
16       have as much of a position here. But we know, based on our  
17       discussions with our engineers, that we don't do that.

18           And, finally, Mr. Love's suggestion that we can  
19       simply, you know, very quickly go out and collect and produce  
20       all of the documents is just not realistic. We're working on  
21       that, but there are a lot of different places to look.  
22       There's a lot of source code. We've got to get through the  
23       source code, find the relevant parts, find the relevant  
24       documents. We're working diligently, but it's a massive and  
25       expensive process.

1                   And, frankly, that's one of the reasons why we want  
2 to have an early claim construction process, to reduce  
3 that -- reduce that burden. But the suggestion that we can  
4 simply just go over to Intel, get the documents, and produce  
5 them right away is just simply not realistic.

6                   THE COURT: Is it the --

7                   MR. LOVE: Your Honor, Jeff Love. May I respond?

8                   THE COURT: No. Hang on a second. It's my turn.

9                   Turning to the defendants, is it the defendant's  
10 contention that the only issue right now is that the  
11 technology that the plaintiffs are suggesting that the defense  
12 used is not technology that the defendants are using? Is that  
13 your defense, or are there other things floating around out  
14 there that you haven't gotten to yet?

15                   MR. SUMMERSGILL: We -- our position, Your Honor, is  
16 we don't use the system that's described in the claims of the  
17 '944 patent. We also believe the claims are invalid and that  
18 the claim construction, I think, would clarify both of those  
19 issues.

20                   THE COURT: And have you described for the plaintiffs  
21 specifically how you think their claims are invalid?

22                   MR. SUMMERSGILL: We haven't yet. And the reason we  
23 haven't yet is because, again, it's their burden to come  
24 forward first with infringement contentions. In fact, we both  
25 agreed to that in the schedule; that is, their infringement

1 contentions should come before our invalidity contentions.  
2 But we're certainly prepared to present our invalidity  
3 contentions once they've presented their infringement  
4 contentions.

5                   And one of the reasons for that, Your Honor, is  
6 because sometimes the invalidity argument depends in part on  
7 the infringement contention. If they take a very broad view  
8 of their patent and say, "It covers A, B, C, D, and E," we may  
9 disagree with that, but we then may say, "Okay. Well, A, we  
10 just disagree with that. B, our products don't do that. And,  
11 C, even if you're right that your patent covers that, then you  
12 cover the prior art and the patent is invalid."

13                   So that's why, you know, in these local patent rules  
14 and in typical patent cases, when you have contentions, the  
15 invalidity contentions follow the infringement contentions.

16                   THE COURT: And what the plaintiff is telling me is  
17 that they're not quite ready to tell you specifically what  
18 their infringement contentions are because they're not certain  
19 what your technology does.

20                   MR. SUMMERSGILL: And, Your Honor -- again, this is  
21 Michael Summersgill.

22                   Just to clarify, looking at our whole schedule, the  
23 sequence -- the relevant sequence here is the parties propose  
24 terms for construction. The parties propose proposed  
25 constructions. In late August we produce our technical

1 production. The claim construction -- I'm sorry. We produce  
2 our documents in late August. The parties then engage in  
3 claim construction briefing. And then in the fall we  
4 have -- we have infringement contentions and invalidity  
5 contentions.

6 So they would have our technical production before  
7 claim construction briefing is submitted. So they'd have that  
8 if they need it. As I said, I don't think they should need  
9 it, but they would have it. And they would have our technical  
10 production before they're required to submit their  
11 infringement contentions.

12 THE COURT: And I'm sorry. I'm looking at your  
13 schedule, and you're saying that all of that information is  
14 going to be disclosed when?

15 MR. SUMMERSGILL: All -- so, Your Honor, just in  
16 terms of the relevant claim construction and contention dates,  
17 we would -- according to our schedule, disclosure of asserted  
18 claims would come -- we had June 22. That would obviously  
19 have to be pushed back. We propose July 13. Parties would  
20 propose terms for construction on July 13. Parties would  
21 propose actual constructions August 10. We would then  
22 complete our technical production, sufficient to show how our  
23 products operate, by August 31st.

24 Plaintiffs would submit their infringement  
25 contentions on October 26th. We would submit our invalidity

1 contentions on December 21. And, actually, claim construction  
2 briefing would be completed by November 21.

3 So the parties -- so at a high level, the parties  
4 propose the terms and -- the terms proposed for construction  
5 first. We then complete our technical document production.  
6 They -- they give us their infringement contentions. We  
7 engage in the claim construction process, and we give them our  
8 invalidity contentions.

9 THE COURT: All right. Thank you.

10 I know the plaintiffs wanted to respond. Go ahead.

11 MR. LOVE: Thank you, Your Honor. This is Jeff Love.

12 With respect to *Wilson Sporting Goods*, again, the  
13 point the Court emphasized -- so, for example, the holding by  
14 that Court is that "despite entry of a final judgment, neither  
15 the trial court nor the parties supplied this court with any  
16 information about the accused products. Thus, this record  
17 affords this court no opportunity to compare the accused  
18 products to the asserted claims." And "this sparse record  
19 lacks the complete context for accurate claim construction."

20 So, I mean, two things are being conflated by the  
21 defendant. One of them is whether information about the  
22 accused products is going to determine the substance of the  
23 construction the Court makes. And the point that *Wilson*  
24 *Sporting Goods* and other cases point out is, no, that's going  
25 to be based on the patent. But the substance of the accused

1 product is going to inform the Court and the parties what's at  
2 issue.

3 So, for example, if they say, "Well, we don't use  
4 temperature the way claimed in the patent," and then it turns  
5 out they measure in Centigrade and they want to argue that the  
6 patent is limited to Fahrenheit, you know, we need to know in  
7 advance what the issue is going to be, whether Centigrade and  
8 Fahrenheit matter. And that's true with every aspect of claim  
9 construction, so that we're -- so that we have an opportunity  
10 to ask the Court for constructions that matter.

11 You know, the other thing is they're proposing, you  
12 know, essentially hiding the ball on their non-infringement  
13 theory for months. They say they know what the  
14 non-infringement theory is. They say they've talked to their  
15 engineers and they're fully informed on that.

16 We've got an interrogatory response due Monday. At a  
17 minimum, even if they can't find all the documents supporting  
18 that theory, they can produce an interrogatory response that  
19 lets us know, you know, for example, "Well, we have a  
20 temperature sensor, but it doesn't do exactly what we think  
21 the claim requires because it does A, B, and C." They can  
22 just spell that out to us and they can produce what documents  
23 they do have in hand.

24 THE COURT: Thank you.

25 I'm not ready right now to set forth what the

1 appropriate schedule is going to be in this case. I want to  
2 get back together with you all in about 10 days. I'm going to  
3 look at my calendar really quickly. I'm going to tell you  
4 what day and time that's going to be.

5 In the meantime, I will read -- I'll take a look at  
6 *Wilson*. I haven't read that, at least not recently. So I'll  
7 take a look at that case. And then I'll be ready to set forth  
8 a schedule the next time we visit with each other. I think I  
9 understand the parameters of each side's argument.

10 So hang on just a moment.

11 (There is a brief pause in the proceedings.)

12 THE CLERK: 2:00 on July 9th.

13 THE COURT: July 9th at 2:00. Does that work for  
14 plaintiff?

15 Well, it must. You have a lot of lawyers there.  
16 Certainly somebody can be there by that date.

17 MR. CLOSE: Yes, Your Honor. We'll make sure that  
18 works for us. This is Howard Close.

19 What time, Your Honor?

20 THE COURT: 2:00.

21 MR. CLOSE: Okay.

22 THE COURT: How about for defense?

23 MR. SUMMERSGILL: Your Honor, this is Michael  
24 Summersgill. We're just pulling up -- you said July 9 at  
25 2:00 p.m. Pacific?

1                   THE COURT: Yeah, sorry about that. Yeah, Pacific.

2                   MR. SUMMERSGILL: Yes, we can do that. Yes, that  
3 works for us.

4                   I'd just note for Mr. Rassam, who is on the line,  
5 that we may have to adjust something, but I think -- I think  
6 we can make that work.

7                   THE COURT: We're not really talking about merits.  
8 We're talking about scheduling right now.

9                   MR. SUMMERSGILL: Okay. Thank you, Your Honor.

10                  THE COURT: All right.

11                  MR. SUMMERSGILL: Your Honor, I didn't know if you  
12 were planning on -- if we're ending it now, if there are other  
13 issues. I think it might be productive to talk about the  
14 infringement and validity contentions issue as well, just to  
15 lay the groundwork for our next discussion, but if you'd  
16 prefer to wait, obviously we can wait.

17                  THE COURT: Well, if you have something on your mind,  
18 now is a good time to let me know.

19                  MR. SUMMERSGILL: All right. Thank you, Your Honor.  
20 Again, this is Michael Summersgill.

21                  So the parties have set forth different proposals on  
22 the timing and schedule of infringement and invalidity  
23 contentions. But the primary dispute there is it really gets  
24 at how meaningful contentions will be. And it's our view that  
25 the parties should be required to state the real positions in

1       their contentions and not simply an initial theory that  
2       continues to evolve throughout the case.

3               And so, for instance, I have said, you know, we don't  
4       use temperature data in the manner required by the claims.  
5       We'd like to see the plaintiffs' position as to why they think  
6       we do. And Mr. Love, in a number of instances, has referred  
7       to our need to come forward with our non-infringement  
8       defenses. I think he's got it backwards. They have the  
9       burden on infringement and the burden of showing how we meet  
10      these claims.

11               And the dispute really is over whether when a party  
12       makes contentions, whether those contentions are final or  
13       whether you really can have an opportunity to amend repeatedly  
14       as the case goes forward.

15               We have proposed a schedule where they have  
16       infringement contentions on October 26th, final invalidity  
17       contentions on December 26th. And then there can be  
18       amendments to those contentions, but only based on information  
19       that was not available at the time the contentions were  
20       submitted.

21               And I think that that approach is -- would be more  
22       productive and more efficient for a couple of reasons. One,  
23       it has the parties preparing -- it is tied into the claim  
24       construction discussion we just had. It has the parties  
25       preparing contentions after knowing what the other side's

1 proposed constructions are. Because infringement and validity  
2 turn in part on claim construction, it makes sense to know  
3 what the parties' proposed constructions are before you do  
4 contentions. Otherwise, once you know a party's construction,  
5 you have to narrowly redo the contentions. And it gives both  
6 parties -- and we're not looking for this -- but it gives both  
7 parties the opportunity to just completely change their theory  
8 under the guise of "Oh, well, we now know what the other  
9 side's constructions or proposed constructions are."

10           Second, requiring that these be real positions, where  
11 you can only amend them based on new information, prevents  
12 what we refer to as the "shifting sands" approach to  
13 litigation. You know, by allowing one set of contentions now  
14 and then amendments after claim construction, even where  
15 parties had proposed those claim constructions that were  
16 adopted, and then not putting any limitations on further  
17 amendments just invites the parties to continually evolve  
18 their theories.

19           And Courts have repeatedly said that it's important  
20 to avoid that. And there are a number that we cited in the  
21 26(f) report, the *Richtek* case and the *Berger* case. But I'd  
22 add the Federal Circuit's *O2 Micro* case, 467 F.3d 1355, 1356.  
23 Basically what the Court said -- what the Federal Circuit said  
24 in *O2 Micro* is that contentions are meaningless unless parties  
25 are required to state their positions and stick to those

1 positions until and if they discover new information.

2 Plaintiffs here are trying to preserve the ability to  
3 amend their contentions even based on information that was  
4 already available to it and -- that was already available to  
5 them. And that will just allow them to do exactly what the  
6 Courts have said, which is engage in the "shifting sands"  
7 approach to litigation. And so that -- that's what we'd like  
8 to prevent.

9 And the third piece is, again, that our schedule  
10 would have them receiving our technical production two months  
11 before they would have to submit their infringement  
12 contentions. And, of course, they have to have some basis for  
13 bringing the suit in the first place, so there's plenty of  
14 time and plenty of opportunity for them to prepare their  
15 infringement contentions under our schedule.

16 THE COURT: Do the plaintiffs want to respond?

17 Don't feel compelled, by the way, to respond. But if  
18 you want to, you're certainly welcome to.

19 MR. CLOSE: Your Honor, this is Howard Close. I  
20 don't have too much to respond. I just would note from a  
21 Texas standpoint, I wouldn't want to play Texas hold 'em with  
22 these fellows. They like to keep their cards in -- but on the  
23 point about good cause, I think the issue that they propose,  
24 one of the disagreements we have on that, in terms of amending  
25 our contentions, would obviously be that, you know, the Court

1 is familiar with and has regularly had to deal with whether  
2 someone can amend things based on good cause. They propose a  
3 definition of good cause, which I would prefer to just let the  
4 Court make a determination of good cause if we amend  
5 contentions.

6 I think we've set out the reasons why we think our  
7 schedule works better than theirs, but if you want us to give  
8 you any briefing, like we described, we'll be happy to do that  
9 before we discuss this with you next, Your Honor.

10 THE COURT: Thank you.

11 I have used a good cause analysis previously in other  
12 cases to determine whether or not someone should be allowed to  
13 change their infringement contentions or not, and I doubt that  
14 I'm going to approach it any differently now.

15 With that, I look forward to speaking with all of you  
16 in about 10 days.

17 Is there anything else from the plaintiffs'  
18 perspective we need to talk about now?

19 MR. CLOSE: Nothing from the plaintiffs, Your Honor.  
20 This is Howard Close.

21 THE COURT: Thank you.

22 Anything else from the defense perspective that we  
23 need to talk about now?

24 MR. SUMMERSGILL: Not at this time, Your Honor.  
25 Thank you.

1                   THE COURT: All right. Thank you, all. See you in  
2 about 10 days.

3                   MR. SUMMERSGILL: Thank you.

4                   MR. CLOSE: Thank you.

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7                   (Proceedings concluded.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-titled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

/s/ Nancy M. Walker

7-2-18

NANCY M. WALKER, CSR, RMR, CRR  
Official Court Reporter  
Oregon CSR No. 90-0091

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DATE

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